UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

LIQUID TRANSPORTERS, INC., a wholly owned subsidiary of TRIMAC TRANSPORTATION, INC.[1] Employer	
and	Cases 4–RC–20215 and 4–RC–20216
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 107[2] Petitioner	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[3] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

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[1] The Employers name appears as amended at the hearing.

[2] The Petitioner's name appears as amended at the hearing.

[3] At the hearing the parties stipulated that the entire record in Case 4-RC-19705 be part of the record of the instant case to address the facts which have not changed since the earlier record was developed. Limited testimony was taken on May 30, 2001 concerning alleged changes since that record was made.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Employer is engaged in the interstate and intrastate transport of liquid and dry bulk chemicals. The Petitioner seeks to represent a unit of all full time and regular part-time drivers, including owner-operators, tank washers and mechanics who are based at the Employer's trucking terminal in Bristol and Croydon,[4] Pennsylvania. The Employer, contrary to the Petitioner, contends that the owner-operators are independent contractors and not employees within the meaning of Section 2(3) of the Act. The parties agree that the drivers, tank washers and mechanics should be included in an appropriate unit. While the Petitioner filed two petitions seeking to represent the owner-operators and the drivers, tank washers and mechanics in separate units, at the hearing, the Petitioner expressed its desire to represent the individuals in a single unit.

A Decision and Direction of Election was issued in *Liquid Transportation, Inc*., a wholly owned subsidiary of Trimac Transportation, Inc. (Liquid Transporters I), Case 4–RC–19705 on October 4, 1999, involving the same parties finding, *inter alia*, that the same owner-operators in dispute in the instant case were not independent contractors but were employees within the meaning of Section 2(3) of the Act. A copy of that Decision is attached hereto as an appendix. The Employer filed a Request for Review of the Decision and Direction of Election. While the Board issued an Order denying the Employer's Request for Review finding that it raised no substantial issues warranting review on October 28, 1999, the undersigned Regional Director approved a request to withdraw the petition on October 27, 1999. No election was held in *Liquid Transporters I*.

The Employer is the exclusive shipper for Rohm & Haas Company at the Rohm & Haas plants in Bristol and Croydon. At the time of the prior Decision, the Employer had no drivers or dispatchers on its own payroll to perform its shipping responsibilities to Rohm & Haas. Instead it used 18 owner-operators who drove tractors which they owned but leased to the Employer, and three other individuals who drove tractors owned by the owner-operators. The Employer also used 21 drivers, 5 dispatchers, 5 wash-rack employees washers and 6 mechanics, "leased" by the Employer from Transpersonnel, Inc.

In October 2000, the Employer ceased using Transpersonnel, Inc. to supply its workforce. The Employer thereafter hired its own workforce directly including approximately 10 drivers (referred to in the record as "company drivers"), 8 tank washers, (referred to in the record as "cleaners") and 5 mechanics.[5] Currently, the Employer uses 26 owner-operators who drive tractors they own but have leased to the Employer. Consistent with the record developed in *Liquid Transporters I*, one owner-operator, Patrick Webb continues to own multiple vehicles and continues to employ another driver to assist him. All of these employees work out of the same Bristol/Croydon facility.

[4] The terminal straddles the boundary between Bristol and Croydon, Pennsylvania.

[5] Some of the employees, including drivers, hired by the Employer previously had worked for Transpersonnel. Several of the previous Transpersonnel drivers used by the Employer became owner-operators.

The Employer's contention that the owner-operators are independent contractors was fully considered and rejected by the undersigned in the original Decision and Direction of Election and by the Board on Review. The parties stipulated to the inclusion of the record in *Liquid Transporters I* because all of the facts contained therein, with the slight modifications noted below, remain true today. Accordingly, the instant Decision incorporates by reference, the facts found in the Decision and Direction of Election in *Liquid Transporters I*.

In finding the owner-operators to be employees rather than independent contractors in *Liquid Transporters I*, the traditional common law of agency standard, which involves a multifactor analysis, was applied.[6] Utilizing this analysis, the prior Decision relied upon a number of factors to reach the conclusion that the owner-operators were employees. The Decision concluded that the owner-operators did not operate independent businesses, as the operators used their trucks to perform work exclusively and indefinitely for the Employer and perform functions which were at the core of the Employer's business. The Decision concluded that the owner-operators did business in the Employer's name, not their own, as, *inter alia,* the operators hauled freight under the Employer's ICC license, the Employer's name and ICC license number were shown on their tractors, and they hauled trailers painted with the Employer's color and design. The Decision found that the operators received guidance and assistance from the Employer in carrying out the business they perform in the Employer's name. The Decision concluded that the owner-operators ordinarily did not engage in outside business, as the Lease Agreement prohibited "sub-leasing" or "trip-leasing". In addition, there was no evidence that any operator had ever used their tractors to perform work for other carriers. The Decision concluded that the operators were under the Employer's substantial control, the Employer retained the right to require that the operators perform assignments, as evidenced, *inter alia,* by the Employer's actions in penalizing operators who rejected runs by dropping them to the bottom of the dispatch list. The Decision concluded that the Employer controlled the manner and means by which operators worked, in that operators were required to comply with the Employer's Driver's Manual and Operating Standards and other rules and policies. The Decision concluded that the operators had no significant entrepreneurial opportunity for gain or loss as, *inter alia,* the owner-operators did not negotiate with the Employer as to the terms of the Lease Agreement or rates of compensation. Finally, the Decision found that only Pat Webb employed his own employees, and that the Employer controlled the identity of individuals whom he hired, as well as their training and their performance. Based on the above, the Decision concluded that the factors of the common law agency test weighed heavily in favor of employee status.

Notwithstanding the above conclusions, the Employer, citing extensively to the prior record, contends that the prior Decision incorrectly applied the law. The Employer also contends that significant and substantial changes to the Employer's operation since *Liquid Transporters I* should lead to a contrary result in the instant case. Contrary to the Employer, the Petitioner

[6] The prior Decision relied heavily upon *Roadway Package System*, 326 NLRB 842 (1998) and *Dial-A-Mattress Operating Corp.*, 326 NLRB 782 (1998) cases in which the Board reexamined the test for determining whether individuals are independent contractors.

contends that the prior Decision should be upheld, and that the evidence introduced at the May 30, 2001 hearing reinforces the conclusion that the owner-operators are statutory employees.

Examination of the entire record in this proceeding demonstrates that the owner-operators continue to sign the same Lease Agreements with the Employer, as they did in *Liquid Transporters I*. Branch Manager Matthew McCunney[7] testified that policies may have been more loosely enforced by his predecessor, such as attending safety meetings, but they are more stringently followed since he became Branch Manager. Thus, attendance at safety meetings is required of both the company drivers and the owner-operators. In addition, McCunney has refined language in disciplinary letters so as to be more specific in tailoring the discipline to fit the infractions. Indeed, McCunney issued a disciplinary letter to an owner-operator that commented on the operator's poor performance, temporarily removed the operator from the dispatch list, and threatened to terminate the lease if the poor performance continued.[8] The Employer has changed its call-in procedure, but the procedure applies to both company drivers and owner-operators.

The record indicates several other changes that have occurred during the past two years. In addition to hauling liquid and dry chemicals for Rohm & Haas, which remains the Employer's primary customer, the Employer now provides delivery service for two new customers, DeGussa Chemicals and Atofina. The work performed for these customers has a different flat-rate fee schedule for owner-operators than that applicable to the Rohm & Haas work. However, the Employer unilaterally determines the rates paid to individuals who drive for these new customers in the same manner in which it determined rates driven by operators who haul Rohm & Haas freight. Drivers who wish to work for either of these two new customers must complete the training provided by those companies. The Employer asserts that this is a substantial change as operators have the freedom to choose to work and train for these new customers. However, company drivers as well as owner operators drive loads for the two new customers.

In addition, the Employer asserts that contrary to the practice applied to owner-operators, the company drivers receive "layover" pay for delays at customers, and receive payment for "empty miles" if they return with no freight. While owner-operators do not explicitly receive "layover" pay, in some instances if the customer pays an additional charge for the delay, a portion of the revenue will be given to the owner-operator. As was true from the prior record, the Employer continues to pay owner-operators $25 an hour when the loading or unloading exceeds 2-3 hours or when Rohm & Haas rejects a load of product. With respect to the issue of "empty miles", owner-operator Steven Bush testified that the amount of mileage is factored into the determination of the flat rate paid by the Employer for a load.

The Employer's manner of compensating owner-operators remains unchanged from *Liquid Transporters I*. The Employer continues to unilaterally determine the flat-rate fee, and the owner-operators must accept the proposed fee offered by the Employer. Although at times an owner operator may ask for a higher fee, and even though in the instant case owner-operator

[7] McCunney has been the Branch Manager at the Bristol/Croydon facility since August 1999.

[8] Another owner-operator testified at the May 30, 2001 hearing that McCunney did not permit him to haul freight for a week due to violations in the completion of his driver logs.

Bush acknowledged in one instance a higher fee was granted, the Employer's unilateral determination of rates remains substantially unchanged.

As in the past, the record developed at the May 30, 2001 hearing demonstrates that while the owner-operators may decline a job assignment, their actions result in their being placed at the bottom of the dispatch list. The Employer asserted that there had been a slight increase in the number of loads refused by owner-operators over the last several months, and McCunney acknowledged that its practice of removal to the bottom of the list upon load refusal is intact. According to Bush, the Employer has also required him to change from hauling a load he had been initially assigned to handling a different, less lucrative, load. Bush estimated that the difference in money for the load was approximately $600, and also required him to incur additional expenses in driving an additional 40-50 miles. Bush further testified that if his tractor is not available, he may use a company tractor to pull a load, but that he is then compensated at a lesser rate. Bush testified that he was required to complete a form and provide it to the Employer concerning his appearance at the Board hearing, or he would risk being placed at the bottom of the dispatch list.

In reviewing the above changes and, notwithstanding the fact that the Employer now employs some of its own workforce rather than leasing it from another entity, the Employer has continued substantial use of owner-operators to perform its work, and the terms and conditions they work under have remained basically unchanged from that presented and considered in *Liquid Transporters I*. To the extent that there have been changes resulting from the establishment of the Employer's own work force, those changes do not affect the terms and conditions of employment of the owner-operators herein. Nor do the changes referred to above constitute significant alteration of the relationship between the Employer and the owner-operators. Upon considering the entire record and for the reasons set forth in detail in the prior Decision, as summarized above, I continue to conclude that the common law of agency factors weigh heavily in favor of employee status. I further conclude, based upon review of the testimony provided at the May 30, 2001 hearing, that changed circumstances do not exist which warrant reversal of my previous determination that the owner-operators are not independent contractors, but are employees within the meaning of Section 2(3) of the Act.[9] Accordingly, I find that the owner-operators petitioned for herein are employees within the meaning of the Act and should be included in the Unit. I further note that the parties continue to stipulate, as they had in the previous record, to the inclusion in the unit of individuals who drove trucks owned by owner-operators, if it was determined that the inclusion of owner operators was appropriate. Accordingly, I shall also include such drivers.

Based on the foregoing, I find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time and regular part-time company drivers, owner-operators, other persons who drive vehicles owned by owner-operators, tank washers and mechanics employed by the Employer at its trucking terminal in Croydon, Pennsylvania, excluding all

[9] The Board's more recent decision in *Slay Transportation Company, Inc.*, 331 NLRB No. 170 (August 25, 2000), which reaffirms the holdings in *Roadway* and *Dial-A-Mattress*, supra, supports this conclusion.

office clerical employees, dispatchers, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently,[10] subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

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LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *NLRB v. Wyman–Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that an election eligibility list, containing the ***full*** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region Four within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, 615 Chestnut Street, Seventh Floor, Philadelphia, Pennsylvania 19106, on or before **July 5, 2001**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper

[10] Your attention is directed to Section 103.20 of the Board's Rules and Regulations, a copy of which is enclosed. Section 103.20 provides that the Employer must post the Board's official Notice of Election at least three full working days before the election, excluding Saturdays and Sundays and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **3 copies**, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall, or by department, etc.). If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, Franklin Court, 1099 14th Street, N.W., Room 11613, Washington, D.C. 20570. This request must be received by the Board in Washington by **July 12, 2001**.

Signed: June 28, 2001

at Philadelphia, PA /s/
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four

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